

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

LESAINT LOGISTICS LLC

Employer ^{1/}

and

Case 9-RC-18119

WAREHOUSE, PRODUCTION, MAINTENANCE AND
MISCELLANEOUS EMPLOYEES, FURNITURE, PIANO,
EXPRESS DRIVERS AND HELPERS, LOCAL UNION NO. 661,
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner ^{2/}

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

I. INTRODUCTION

The Employer is engaged in the trucking and warehouse business throughout the United States, including its facility at 5565 Alan B. Shepard Street, Trenton, Ohio, the only location involved in this proceeding. The Trenton facility is located about ½ mile from the Miller Brewing Company (Miller's Brewery), which is the customer for about 95 percent of the Employer's business originating from this facility. The Employer warehouses empty cans and bottles provided by suppliers for Miller and transports them to the brewery as requested by Miller. The Employer employs about 350 employees nationally and about 90 employees at the Trenton facility.

The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent approximately 36 employees in a unit comprised essentially of all full-time and regular part-time drivers, including dispatch drivers, drop lot drivers and roller bed drivers employed by the Employer at its Trenton, Ohio facility, excluding all warehouse employees, clerical employees, guards, lead drivers and supervisors as defined in the Act. The parties disagree about the scope of the unit and the unit placement of the three lead drivers. The Employer, contrary to the Petitioner, contends that an appropriate unit

^{1/} The name of the Employer appears as amended at the hearing.

^{2/} The name of the Petitioner appears as amended at the hearing. Additionally, the Petitioner requested at hearing that a shortened name be used on the ballot. The shortened name for the Petitioner is: Teamsters Local Union No. 661 which will be used on the ballot.

must include not only the drivers, but also the material operators (warehouse employees), plant clerical employees, quality control employee, the janitor/repack employee, mechanics, and the drop lot clerk. The Petitioner would exclude the three lead drivers as supervisors within the meaning of Section 2(11) of the Act, while the Employer would include them in the proposed unit.

At the hearing, the parties stipulated that there is no history of collective bargaining affecting any of the employees involved in this proceeding. I note that the Petitioner has stated its willingness to proceed to an election in any unit that is found appropriate.

I have considered the evidence and the arguments presented by the parties on the appropriateness of the unit and have concluded for the reasons discussed in detail below that the unit sought by the Petitioner, limited to drivers is appropriate for the purposes of collective bargaining. In reaching this conclusion, I find that the record does not establish that the warehouse employees share such a substantial community of interest with the drivers as to warrant their inclusion in the unit. Although disagreeing with the Employer's contention that an appropriate unit must include all of its drivers and hourly paid warehouse employees, I find, in agreement with the Employer, that the drop lot clerk – whose work situs is at a drop lot adjacent to Miller's Brewery – does share a substantial community of interest with the drivers while lacking a corresponding community of interest with any other employee group, which compels that the drop lot clerk be included in the unit found appropriate. With respect to the unit placement of the three lead drivers, I find that the evidence does not support the Petitioner's contention that they are supervisors within the meaning of the Act. Accordingly, I will include them in the unit.

Accordingly, I will direct an election in a unit of all full-time and regular part-time drivers, including lead drivers, group lead drivers, dispatch drivers, drop lot drivers, roller bed drivers, and the drop lot clerk employed by the Employer at its Trenton, Ohio warehouse and transportation facility, excluding all material operators, (warehouse employees), all office clerical employees, all plant clerical employees, the quality controller, the janitor/repack employee, all mechanics, all managerial employees, and all guards and supervisors as defined in the Act.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and reasoning that supports my conclusions on the issues.

II. THE EMPLOYER'S OPERATION

The Employer is engaged in warehousing empty cans and bottles delivered by Miller's suppliers, delivering empty cans and bottles to the Miller assembly lines for "just in time" manufacturing of product and by providing Miller with local transportation needs, including shuttling empty trailers to and loaded trailers away from the Miller docks to drop lots for over the road transportation by Miller contractors. The Miller Brewery is located about ½ mile from the Employer's warehouse facility.

The director of the Central Region, Dan Harmon, is the Employer's highest ranking manager at the Trenton facility. General Manager Beverly Groene reports directly to Harmon and is responsible for overall daily operations. Reporting directly to Groene are Brian Sullivan, Manager for Transportation Operations, Kevin Rhymer, Distribution Center Manager, and Debra Turner, Administrative Supervisor. Sullivan is responsible for overseeing all of the drivers and the drop lot clerk. Rhymer has overall charge of the material operators, the quality controller, and the janitor/repack employee. He is assisted by three warehouse shift leaders who report directly to him. Turner has supervisory responsibility for the plant clerical employees. The garage that is adjacent to the warehouse is under the supervision of Garage Manager Larry Homer who reports to Sandy Baxter, the Employer's Director of Operations for Transportation. Baxter works off-site and has responsibility over several different facilities. Homer supervises two mechanics who primarily work in the garage. The record reflects, and the parties stipulated, that all of the above individuals are supervisors within the meaning of Section 2(11) of the Act.

The Employer's drivers and the vast majority of its warehouse personnel work on one of three shifts: 7 a.m. to 3 p.m., 3 p.m. to 11 p.m. and 11 p.m. to 7 a.m. Many of the Employer's employees, including drivers, material operators, and clerical employees, congregate in the Employer's operations room for shift changes. Different "boards" are posted in the operations room, including a sign up board for overtime and vacations. The operations room also serves as a break and lunch room.

The Drivers and the Drop Lot Clerical:

The Employer's drivers are divided into three groups: roller bed drivers, dispatch drivers and drop lot drivers. There are about five or six roller bed drivers and four dispatch drivers per shift. There are eight drop lot drivers, including three on the first and second shifts, respectively, and two on the third shift. Roller bed drivers have the most contact with the warehouse and warehouse employees. They utilize special trailers containing rollers to shuttle palletized empty cans and bottles from the Employer's facility to Miller. After arriving on the brewery property, the roller bed drivers proceed to the packaging/receiving area. The drivers back their trailers into a designated dock door for unloading. Using an automated system, the drivers off-load empty glass and can receptacles directly onto Miller's production lines where they are filled with product and initiate the "just in time" manufacturing process. Roller bed drivers make about 15 to 20 round trips per shift between the brewery and the Employer's facility. Their work is dictated by schedules provided by Miller and updated via e-mail during the course of each shift. Although the roller bed drivers typically spend their shifts shuttling back and forth between Miller and the Employer, during slower production periods and during times when their trailers are being loaded, they make "moves" at the warehouse positioning empty trailers in and trailers filled with product out of the dock doors.

The dispatch drivers operate on the other end of the Miller production process by shuttling empty trailers into dock doors and loaded trailers out of those same doors at the direction of Miller. They shuttle the trailers filled with product to the semi-truck parking area of the brewery. The group lead dispatch driver, one of the four dispatch drivers on each shift, works in the glass warehouse area at the brewery and receives an additional 60 cents an hour.

The group lead dispatch drives a special truck with a boom that is used to empty glass dumpsters and to return the dumpsters to the inside of the facility. The group lead dispatch is also responsible for removing dunnage, including empty kegs, skids, papers, cardboard and plastic from the brewery. The dispatch drivers perform all of their work at the brewery and only return to the Employer's facility at the end of the shift or to refuel their trucks.

The Employer's drop lot drivers perform their work at the brewery and at the two drop lots located just beyond the brewery gate and security checkpoint. One of these drop lots is designated for contractor parking while the other is the EF lot, and is used by a particular trucking company that hauls Miller product. That company contracts with the Employer to shuttle its empty trailers into the brewery to be loaded with product and back to the drop lot where its drivers transport the product over the road. A lead driver on each shift works out of the EF lot. Drop lot drivers also take empty trailers brought to the drop lots by drivers for various other trucking contractors and place them in a semi-truck parking area on the brewery premises. The empty trailers are taken to the brewery docks for loading by the dispatch drivers who return loaded trailers to the semi-truck parking area for transportation back to the drop lots by the drop lot drivers. The loaded trailers are taken from the drop lots for over the road transportation by drivers for the trucking contractors. Drop lot drivers may return to the Employer's facility from time to time when a beer load needs to be reconfigured by material operators. The record does not disclose how often such loads are brought to the warehouse and the frequency with which they are brought there by the Employer's drop lot drivers as opposed to being brought to the facility by drivers for trucking contractors, referred to in the record as "live drivers."

The drop lot clerical, who works first shift at the contractor lot, is responsible for handling all of the customer contacts in connection with moving trailers located in the drop lots to and from the facility. Such customer contacts include e-mails, faxes, and paperwork, letting drivers in and out of the gates, and passing out load paperwork to drivers. On the second and third shift, these clerical functions are assigned to group lead drivers, but currently the drop lot clerical functions on the second shift are performed by a driver who is on light duty and unable to perform his regular duties.

The Warehouse Employees and Mechanics:

The primary job classification in the Employer's warehouse is material operator. There are approximately 30 employees in that classification. The principal function of the material operators is to load the empty roller bed trailers with empty cans and bottles for transportation to the Miller facility where they are off-loaded by the roller bed drivers onto the Miller production lines. The material operator or shift leader notifies the roller bed driver when a load is ready for transport to the brewery. The material operators also receive and store incoming can and glass receptacles and two operators are designated to handle storage of small public accounts – that is the accounts of non-Miller customers who utilize the Employer's warehouse capacity to store various types of products. These public accounts may include items as diverse as ceiling fans, bathroom fan parts, sinks and water coolers.

A material operator may be assigned by the Employer to work at the brewery on rare occasions when the Employer lacks sufficient roller bed drivers. In this regard, the record

reflects that on two occasions, once in November and again in December 2006, a material operator worked a single shift at the brewery and was responsible for the automated unloading of bottles and cans onto the Miller production lines. This allowed the Employer's roller bed drivers to make a greater number of runs between the Employer and Miller alleviating the production shortfall, on the days in question, created by having an insufficient number of drivers. However, the material operator did not drive a truck to this location.

The Employer utilizes five plant clerical employees at its warehouse facility. Three of the five are classified as receiving clerks and the other two serve as special accounts clerks. The special accounts clerks and one receiving clerk work on the first shift. There is one receiving clerk on the second and third shift. All five clerical employees are cross trained to perform each others' functions. The receiving clerks' principal duty is to sit at a window where outside carriers – many of whom are carrying empty cans and bottles – come for directions to which of the Employer's 40 docks they should deliver their loads. Receiving clerks also provide the drivers with instructions to move, or spot, trailers from parking lot locations into dock locations when the drivers don't have loads available. The special accounts clerks are responsible for receiving and processing the public accounts storage items. Four of the five receiving clerks were originally employed as material operators in the warehouse.

The Employer's quality controller employee is responsible for ensuring quality on customer products throughout the warehouse facility. The quality controller investigates any deficiencies in customer product that is transported to the brewery to learn how the error occurred. This includes issues with material, cans, bottles, torn cartons, missing cans or bottles, bands and pallets. The janitor/repack employee is responsible for performing janitorial tasks throughout the facility and for repacking cartons filled with customer product. He utilizes a tool crib in the warehouse where his supplies are kept.

The mechanics service the Employer's trailers, trucks and forklifts and work in the garage located across the employee parking lot from the warehouse. Although most of their work takes place in the garage, they have a service truck to go to Miller's premises to perform repair work on the Employer's trucks and trailers in the event of a breakdown at the brewery.

The Lead Drivers:

The three lead drivers, as previously noted, operate from the EF lot shuttling trailers to and from the Miller semi-truck parking area. They spend about 90 percent of their work day engaged in driving tasks. In compensation for their additional duties, they are paid \$1.60 per hour over the regular drivers' rate. However, some of the more senior regular drivers earn a higher hourly wage than the lead drivers by virtue of their length of service with the Employer. The additional duties performed by the lead drivers include spending between 10 to 20 minutes at the end of each shift filling out an "hours of service" book containing all the drivers' hours to ensure that the drivers do not exceed the number of hours that they are permitted to work on a weekly basis under Department of Transportation regulations. Lead drivers also check the drivers' time cards against their daily logs and sign off on the time cards when a driver comes in late or leaves early. When a driver has an accident the lead driver provides the driver with the information needed to obtain the required post-accident drug and alcohol testing.

Lead drivers are also responsible for ensuring that the overtime board is completed each week. Drivers have until a certain time on Thursday of each week to volunteer for possible overtime opportunities. The board accounts for a variety of possibilities, including situations where a driver is absent or tardy and another driver has to be held over or called in to cover the shift. If the overtime board is not completely filled by the designated time on Thursday, the lead driver on duty will equalize the number of overtime opportunities for each driver by placing drivers' names on the board.

Lead drivers wear the same uniforms as other employees and do not attend the Employer's management meetings. The record discloses that lead drivers do not hire, fire or discipline employees and they do not perform annual evaluations of employees.^{3/} There is no evidence that lead drivers recommend or grant wage increases to employees or make daily job assignments based on driver competence or skills. Lead drivers are expected to move drivers around as needed to cover when a driver calls off work. This is accomplished by taking the driver who is signed up for a particular overtime opportunity and placing that driver where needed to meet production requirements. When anything unusual occurs in connection with the driving operation, the lead drivers contact General Manager Groene or Manager for Transportation Operations Sullivan, both of whom are always available via the Employer's Nextel cell and two-way service.

Wages, Hours, and Working Conditions:

All of the Employer's hourly employees are entitled to the same benefits, including vacation and holiday time, health insurance coverage and a retirement plan. They all wear the same type of uniform, are covered by the same employee handbook and progressive disciplinary policy, have the same shift starting times (with a few exceptions), park their personal vehicles in the same employee parking area at the warehouse facility, and use the same outside smoking patio. With the exception of the mechanics, all of the Employer's hourly employees clock in at the same time clock. Warehouse employees are entitled to two 20 minute paid breaks and a paid lunch.^{4/} Drivers are apparently entitled to take such breaks as well, but often do not because of production demands. Additionally, when drivers do take breaks, they take them where they are, which is frequently at the drop lots or on Miller's premises, rather than at the Employer's facility.

The Employer's drivers are paid on a scale between \$13.50 and \$17 per hour, and the highest paid drivers earn slightly above \$17 if they also receive a shift differential. The material operators earn an hourly rate between \$12.50 and \$16 per hour. However, there is testimony that the material operators pay scale tops out at \$24 per hour but the evidence is that they actually make between \$12.50 and \$16 per hour. The clerical employees may start at less than \$12.50 per

^{3/} The record discloses that lead drivers sit in on evaluation meetings on some occasions. There is no evidence, however, that they make any recommendations in connection with their participation in these meetings.

^{4/} The mechanics are the exception as they do not receive paid breaks.

hour, but can, like the material operators, theoretically earn up to \$24 per hour but apparently none of the clericals earn close to this amount. The mechanics have the highest wage scale of the Employer's hourly employees, but the record does not disclose their actual wages or the precise range of the scale.

The Employer's drivers are required to have commercial drivers licenses (CDLs) to perform their jobs. In this regard, they are responsible for obtaining such licensure on their own as the Employer does not have a CDL training program. The material operators are required to have forklift certifications. In addition, four of the five plant clericals employed at the warehouse facility also have forklift certifications, but such certification is not a prerequisite for a clerical position. The material operators and clerical employees regularly use computers in the course of their work, while the drivers do not. However, drop lot drivers assigned to the second and third shifts may use computers to keep track of the drop lot paperwork, the duty performed by the drop lot clerical on the first shift.

There is no temporary interchange between the drivers and the warehouse employees and permanent interchange has been negligible. There is no evidence of any drivers moving to the warehouse in one capacity or another and there have been only one or two employees who came from warehouse positions to driver positions in the past 5 years. None of the current drivers began employment as warehouse employees.

The drop lot and dispatch drivers spend nearly their entire shifts at the brewery or at the drop lots and generally return to the Employer's facility only to refuel. They have contact with the Employer's warehouse employees only during shift change in the operations room where they punch the timeclock, obtain their schedules and consult one or more of the information boards, including the overtime and vacation boards. The roller bed drivers have somewhat more contact with the warehouse employees as their duties require them to shuttle back and forth between the brewery and the Employer's facility between 15 and 20 times a shift for the purpose of having their specialized trailers loaded with pallets of empty cans and bottles for insertion into the Miller production lines. Additionally, they may spot trailers at the Employer's facility at the direction of a receiving clerk when their load of empties is not immediately available for transport to Miller. The roller bed drivers do not assist the material operators in the loading process, but will confirm with them that a load is completed and ready to be shipped to Miller.

III. THE LAW AND ITS APPLICATION

The Act does not require that the unit for bargaining be the only appropriate unit, or the ultimate unit, or even the most appropriate unit; the Act requires only that the petitioned-for unit be appropriate. *Transerv Systems*, 311 NLRB 766 (1993); *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950). Moreover, a union is not required to seek representation in the most comprehensive grouping of employees unless such grouping alone constitutes an appropriate unit. *Bamberger's Paramus*, 151 NLRB 748 (1965). Although not dispositive, a petitioner's unit desire is a relevant consideration. *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964). It is noted that there is often more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining. *Overnite Transportation Co.*, 322 NLRB 723 (1996).

The Board has long held that the unit placement of truck drivers is predicated on their community of interests vis a vis the other employee groups sought to be included in the proposed unit. *E.H. Koester Bakery Co.*, 136 NLRB 1006 (1962). In formulating what has come to be known as the *Koester Rule* the Board considers the following community of interest factors in determining truck driver placement in a bargaining unit:

(1) Whether they [drivers] have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment; and (2) whether they are engaged in the same or related production process or operation, or spend a substantial portion of their time in such production or adjunct activities. *Id.*, at 1011.

Following issuance of the *Koester* decision the Board has often found a unit limited to truck drivers to be appropriate for purposes of collective bargaining. See, e.g., *Publix Super Markets*, 343 NLRB 1023, 1029 (2004); *Home Depot USA*, 331 NLRB 1289 (2000); *Novato Disposal Services*, 330 NLRB 632 (2000); *Overnite Transportation Company*, 325 NLRB 612 (1998). In *Publix*, supra, the Board reiterated the community of interest factors considered in determining whether a separate community of interest for drivers exists. They are: “(1) functional integration; (2) frequency of contact with other employees; (3) interchange with other employees; (4) degree of skill and common functions; (5) commonality of wages, hours, and other working conditions; and (6) shared supervision.” Citing, *Ore-Ida Foods*, 313 NLRB 1016 (1994) *affd.* 66 F.3d 328 (7th Cir. 1995).

I turn now to an application of the above-community of interest factors to the facts in the subject case. I note that there is some functional integration in the process of supplying Miller with the empty receptacles necessary for its manufacturing process. In this regard, the roller bed drivers spend their shifts shuttling back and forth between the Employer’s warehouse and the brewery in a continuous process of picking up and discharging empty receptacles onto the Miller production lines. In the course of this process, the roller bed drivers have some interaction with the warehouse material operators who load the trailers, but this interaction is primarily confined to confirmation that the roller bed driver’s load is ready. Similarly, the roller bed drivers interact with the receiving clericals who direct them to spot trailers in the warehouse yard and to move trucks into and out of the Employer’s docks.

There is even less interaction between both the dispatch and drop lot drivers and the warehouse employees^{5/} as these drivers spend nearly their entire shifts at the brewery and adjacent drop lots where they move empty trailers and trailers that are filled with product to facilitate the movement of the completed product from the brewery to contractor drivers who convey it over the road. In this regard, the process in which the drivers are engaged is wholly independent of that of the material operators except that there could not be a product for the

^{5/} My reference in this section to the “warehouse employees” includes all of the employees proposed for inclusion in the unit by the Employer. These include not only the material operators, plant clericals, quality controller and janitor/repack employee who work in the warehouse facility, but also the mechanics who work in the garage that is physically located on the same premises across the employee parking lot.

dispatch and drop lot drivers to move without the provision of empty receptacles for the beginning of the production line. Although there is some incidental contact between many of the hourly employees at shift change in the operations room, I conclude, on balance, that the factor of “functional integration” does not tend to militate for or against inclusion of the drivers in an overall unit with the warehouse employees.

With regard to the factor involving “frequency of contact with other employees,” the evidence shows that the drivers have little daily work contact with other employees, with the exception of the incidental contact that occurs between nearly all hourly employees at shift change, only the roller bed drivers come into regular contact with warehouse employees during the course of their shifts and this contact does not involve side-by-side labor to get the work out. Rather it involves a handing off of the task from one set of employees to another.^{6/} The dispatch and drop lot drivers, as noted above, have substantially less contact with warehouse personnel as they spend their shifts moving empty and filled trailers at the brewery and drop lots at the direction of Miller personnel. The exception to this limited contact between drivers and non-drivers is the contact between the drop lot clerical and the drivers. The drop lot clerical on the first shift, is responsible for processing the load paperwork and for releasing drivers into the brewery. More significantly perhaps, the drop lot clerical has little daily contact with warehouse personnel. Accordingly, I conclude that this factor militates strongly in favor of the drivers constituting a separate appropriate unit with the inclusion of the drop lot clerical who has little contact with warehouse personnel, including other clerical employees.

Drivers also have limited interchange with non-drivers. There is no temporary interchange between drivers and the warehouse employees and none of the current drivers previously worked in the warehouse. Accordingly, I find that this factor too militates strongly in favor of a conclusion that the drivers constitute a separate appropriate unit for purposes of collective-bargaining.

I turn now to a consideration of the degree of skill and common functions possessed by the drivers and other employees that the Employer seeks to include. Simply put, the drivers possess skills and perform functions that are distinctly different from that of the warehouse employees and the mechanics. The drivers are engaged in driving trucks even though the roller bed drivers also perform automated unloading tasks. In contrast, the material operators manually load and unload trucks; the clerical employees process load data and the mechanics perform mechanical work on equipment and vehicles. The warehouse employees use computers in the course of performing their work and the plant clericals specifically use some clerical skills in connection with the input and transference of data. Conversely, the drivers do not use computers in the course of performing their work, with the limited exception of those few drivers assigned to perform load processing work similar to that performed by the drop lot clerical. Additionally, the drivers must have CDLs to perform their jobs and must pass a test to obtain such a license. The material operators, and nearly all the plant clerical employees, have fork lift certificates, but do not hold CDLs. The mechanics also possess distinct skills from the other groups as they are

^{6/} As noted, the record discloses that occasionally a material operator will be sent to Miller to handle the unloading tasks when there are insufficient drivers to maintain production demands. However, only two such instances of this type of interaction were noted on the record and it appears that this type of employee contact is unusual.

responsible for the repair and maintenance of the Employer's equipment, including its tractors and trailers. Thus, this factor clearly militates in favor of a finding that the drivers possess a distinct and separate community of interest from the other employees sought to be included in the unit by the Employer.

Although the wage range data on the record is not precise, it is reasonably clear that the mechanics earn the highest hourly wage. Drivers are in the next highest range of actual as opposed to theoretical or potential pay, followed by the material operators, and then the clerical employees. Nearly all of the Employer's hourly employees work similar hours, but their conditions of employment vary somewhat.^{7/} Further, I note that the drivers spend most of their time in their trucks and away from the facility while the other employees work in the warehouse or the garage. The only exception is the drop lot clerk and the very rare occasions when a material operator may be assigned to the brewery to assist with unloading duties. There are obvious differences in the wages and working conditions of the drivers and the other employees sought to be included in the unit by the Employer. At the same time, I recognize that there are some similarities in wages and the hours of work of most hourly employees. I find, on balance, however, that the differences between the drivers and other employees in these areas are significant enough to weigh in favor of a separate community of interest for a unit consisting of the drivers.^{8/}

Finally, I turn to whether there is common supervision for the employees involved. General Manager Beverly Groene is in charge of all of the hourly employees at the facility, with the exception of the mechanics. However, the record discloses that there are two very distinct reporting lines for the warehouse and the transportation sides of the Employer's operation. Manager for Transportation Operations Brian Sullivan is in charge of all the drivers and the drop lot clerk while Distribution Center Manager Kevin Rhymer is in charge of the material operators, the quality controller, and the janitor/repack employee. The mechanics have yet a third supervisory hierarchy from Garage Manager Larry Homer to Director of Transportation Operations Sandy Baxter, who works at an undisclosed off-site location for the Employer. This factor provides further support for a finding that the drivers constitute a distinct and separate grouping possessing a community of interest apart from those shared by other employees whom the Employer would include in the unit.

Based on the above analysis of the community of interest factors considered by the Board, and the record in its entirety, I find that the drivers and the drop lot clerk constitute an appropriate unit for purposes of collective bargaining. Accordingly, I will direct an election for that unit.

^{7/} In the recent past drivers have worked 12 hour shifts as opposed to the 8 hour shifts now worked by nearly all the hourly employees. It is not clear from the record whether the 12 hour shifts for drivers will be reinstated at some point.

^{8/} I make this finding again recognizing that the drop lot clerk is an exception as the drop lot clerk is more appropriately included with the drivers by virtue of the clerk's location and work-related contact with them. Moreover, if the drop lot clerk classification is not included with the drivers, that employee may lack a community of interest with the other clerks and warehouse employees so as to be left without any other possibility of representation.

In reaching my conclusion as to the appropriate unit, I fully considered the briefs submitted by the parties, including the cases on which they relied. In this regard, I find the cases relied on by the Employer in support of its position that a unit limited to drivers is not appropriate to be clearly distinguishable. The Employer seized upon the drivers' role in a "functionally integrated" operation to support its contention that only a wall-to-wall unit of hourly employees is appropriate for collective bargaining without regard to a full consideration of the other relevant factors. The Board's decisions in *Scholastic Magazines, Inc.*, 192 NLRB 461 (1971), *Avon Products, Inc.*, 250 NLRB 1479 (1980); *National Health Laboratories, Inc.*, 239 NLRB 213 (1978); *Boston Medical Laboratory, Inc.*, 235 NLRB 1271 (1978); and *Queen City Transports*, 141 NLRB 964 (1963) relied upon by the Employer are all factually distinguishable from the instant case.

In *Scholastic Magazines*, supra, the petitioner sought to represent a unit limited to the employer's warehouse and maintenance departments while the employer contended that the unit must include all of the employees involved in the order filling process. Id. The Board overruled the Regional Director's conclusion that the employees sought by the petitioner possessed a sufficiently distinct community of interests from other employees to constitute an appropriate unit. The most noticeable difference between *Scholastic Magazines* and the instant case is that, with the exception of a maintenance department employee who picked up customer mail orders at the post office, *Scholastic Magazines* does not involve drivers of any kind. Additionally, here, unlike *Scholastic Magazines*, substantial distinctions can be drawn between the drivers and other employees with respect to community of interest factors such as wages, level of skills and supervision. Moreover, the drivers here spend much, if not all, of their work time away from the warehouse facility and therefore have substantially less interchange with other employees than do the order filling employees involved in *Scholastic Magazines*.

Similarly, the Board's decision in *Avon Products*, supra, does not support the Employer's position. Initially, I note that the underpinnings of the decision in that case are largely predicated on the same order flow process rationale that exists in *Scholastic Magazines*, a case cited by the *Avon Products* Board as being "remarkably similar." Once again, the decision in *Avon Products* does not involve drivers, but rather a manufacturing and distribution operation from which a large number of employees initially were excluded as being office clerical employees. The Board concluded that a significant number of these employees were, in fact, plant clerical employees as they were involved in an integrated order flow process and shared a significant community of interest with other employees in the petitioned for unit, including similar wages, hours, and other working conditions. I find *Avon Products* distinguishable from the subject case largely for the same reasons noted above in my discussion of *Scholastic Magazines*. In addition, I note that the majority of the drivers here are not directly involved in the same distribution or flow process as are the warehouse employees. Certainly, there is a functional integration between the tasks performed by the roller bed drivers and warehouse personnel, but the drop lot and dispatch drivers could function largely independently of the warehouse employees assuming that empty beer receptacles continued to be available to initiate the production process.

The Board's decision in *Boston Medical Laboratory*, supra, another case cited by the Employer, involves a driver unit sought by the union, but the employees were drivers of passenger automobiles engaged in the delivery and pick up of laboratory specimens rather than truck drivers. Thus, their jobs did not require and they did not possess any specialized training or licensure as in the instant case. Moreover, the drivers shared at least some common supervision with other employees sought to be included by the Employer in *Boston Medical Laboratory* in the appropriate unit. Additionally, at least some of the drivers in *Boston Medical Laboratory* were dual function employees who performed packaging, shipping, vehicle maintenance, or custodial work. Here, the drivers do not perform any of the same tasks or functions as that of the Employer's warehouse personnel. Accordingly, I find that the Board's decision in *Boston Medical Laboratory* is again clearly distinguishable from the subject case and does not support the Employer's contention that a unit limited to drivers is inappropriate.

Although I have fully considered and found inapposite all of the cases relied upon by the Employer in support of its contention that the driver unit is inappropriate, I specifically note that the decision of an administrative law judge to include mechanics in a unit of drivers, when both groups were sought by the petitioner, in *Queen City Transports*, supra, does not mandate that the mechanics involved here must be included in the same unit as the drivers. This is particularly so when they have not been sought by the petitioner and where, unlike the situation in *Queen City Transports*, they do not share common supervision with the drivers even at the highest managerial level on site. Accordingly, I do not find the Employer's reliance on *Queen City Transports* to provide a persuasive argument for the inclusion of the mechanics in the unit limited to the drivers sought by the Petitioner.

Having found that a unit limited to drivers, with the inclusion of the single drop lot clerk, constitutes an appropriate unit for purposes of collective bargaining, I now turn to a consideration of whether the lead drivers must be excluded from the unit found appropriate as statutory supervisors. Before analyzing their specific duties and authority, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer

supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the lead drivers involved here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), in light of the Supreme Court’s finding in *Kentucky River*. See also, *Croft Metals, Inc.*, 348 NLRB No. 38 (September 29, 2006) and *Goldencrest Healthcare Center*, 348 NLRB No. 39 (September 29, 2006), issued at the same time as *Oakwood*. In *Oakwood*, the

Board addressed the Supreme Court's rejection of the Board's interpretation of Section 2(11) in the healthcare industry as being overly narrow and adopted "definitions for the term 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act." *Oakwood*, supra, slip op. at 3.

With regard to the Section 2(11) criterion "assign," the Board considered that this factor shares with other Section 2(11) criteria the "common trait of affecting a term or condition of employment" and determined to construe the term "assign" "to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." Id, slip op. at 4. The Board reasoned that, "It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function." Id. The Board clarified that, "... choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" Id.

The Board sought to define the parameters of the term "responsibly to direct" by adopting the definition established by the Fifth Circuit in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, (5th Cir. 1986):

To be responsible is to be answerable for the discharge of a duty or obligation In determining whether "direction" in any particular case is responsible, the focus is on whether the alleged supervisor is "held fully accountable and responsible for the performance and work product of the employees" he directs Thus in *NLRB v. Adam [&] Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7th Cir. 1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department. (at 1278). *Oakwood*, slip op. at 6 – 7.

In agreeing with the circuit courts that have considered the issue, the Board found that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly." In clarifying the accountability element for "responsibly to direct" the Board noted that, "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id, at 7.

In *Kentucky River*, the Supreme Court rejected the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing

less skilled employees to deliver services.” *NLRB v. Kentucky River Medical Center, Inc.*, 532 U.S. at 713. Following the admonitions of the Supreme Court, the Board in *Oakwood* adopted an interpretation of the term “independent judgment” that “applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise . . . professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Supra*, slip op. at 7. The Board noted that the term “independent judgment” must be interpreted in contrast with the statutory language, “of a merely routine or clerical nature.” *Id.*, slip op. at 8. Consistent with the view of the Supreme Court, the Board held that, “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* (citation omitted) However, “. . . the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Id.*

With respect to the supervisory status of lead drivers Randy Woodruff, Gary Preston, and Jerry Hall, I have examined the record in light of the precedent discussed above and find that none of these individuals are supervisors within the meaning of Section 2(11) of the Act. First, I note that there is no contention or evidence that any of the lead drivers have the authority in the interest of the Employer to hire, transfer, suspend, lay off, recall, promote, discharge, adjust employees’ grievances, or effectively to recommend such action. Next, in determining the lead drivers’ supervisory status, I turn to a consideration of whether they responsibly direct and assign other employees work, reward employees or effectively recommend such through their participation in evaluations, discipline employees or effectively recommend any such action through their documentation and monitoring role. I do so being mindful of the Supreme Court’s admonitions in *Kentucky River* and the Board’s recent decisions defining the terms responsibly to direct and assign, as well as the term “independent judgment.”

With regard to discipline of employees, the record reflects only that lead drivers prepare and sign off on “Incident Reports” which report employee conduct in areas such as attendance, adherence to procedure, and the occurrence of injuries and accidents.^{9/} The Employer utilizes a progressive disciplinary procedure providing for oral warnings, written warnings, a last chance agreement and finally termination. Incident reports are not part of this progressive disciplinary procedure. Indeed, the record discloses that the Employer does not consider such reports to constitute discipline and that they might only be considered in the context of disciplining an employee after an independent investigation of the reported event(s) by an undisputed manager or supervisor. In sum, it is clear that the role of lead drivers is only reportorial in completing such incident reports. It is well settled that the authority to discipline must be established by a showing that the disputed individuals’ participation in the disciplinary process leads to personnel action without independent review or investigation by other managerial or supervisory personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), citing *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635 (2001). Thus, the Board has repeatedly held that

^{9/} The lead drivers provide a driver experiencing a work related accident with the location information for the driver to receive post-accident drug and alcohol testing. There is no evidence that the lead drivers exercise any discretion in connection with providing such information.

the mere exercise of a reporting function that does not automatically lead to further discipline or adverse action against an employee does not establish supervisory authority. See, *Illinois Veterans Home At Anna L. P.*, 323 NLRB 890 (1997); *Ten Broeck Commons*, 320 NLRB 806, at 812 (1996).

Based on the foregoing, and the record in its entirety, I find that the lead drivers do not discipline employees nor do they effectively recommend such action. Accordingly, I find that they are not statutory supervisors based on this criterion.

I turn next to the role of the lead drivers in evaluating employees and the effect that this role has on employees receiving wage increases and other benefits. The record discloses that incident reports contained in an employee's personnel file may be considered by an undisputed manager or supervisor in evaluating an employee's annual performance. However, as noted above, these incident reports are purely factual recitations. Moreover, any disputed report is independently investigated by a statutory supervisor. Additionally, lead drivers may sit in on evaluation meetings, but there is no evidence that they make any recommendations in connection with the completion of employee evaluations during the course of any meetings in which they participate.

Here, it is difficult to make a case that the lead drivers play any meaningful role in the evaluation of employees. However, assuming that such a role had been established, it is well-settled that a putative supervisor's evaluation of an employee without a recommendation for a wage increase or other tangible benefit does not constitute an effective recommendation for reward. In this regard, the Board has repeatedly noted that Section 2(11) does not include the term "evaluate" in its enumeration of supervisory functions; thus, when an evaluation does not by itself affect wages, promotional opportunities, or the job status of the employee being evaluated, the individual who performs the evaluation will not be found to be a statutory supervisor. See, *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000); *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999). The Board has also held that when undisputed statutory supervisors have final authority with respect to evaluations and use their own independent judgment in evaluating employees, the role of the subordinate employee in the evaluation process is merely advisory and preliminary. *Children's Farm Home*, 324 NLRB 61 (1997) (undisputed supervisors independently investigated to determine whether recommended merit increases were warranted); see also, *Quality Chemical Incorporated*, 324 NLRB 328 (foremen not supervisors where undisputed statutory supervisors reviewed evaluations, could make modifications, and participated in the review with the evaluated employee). Here, there is no evidence that the lead drivers prepare evaluations or have input into them other than their role in making factual recitations embodied in the Employer's incident reports. Additionally, there is no evidence that they make any recommendations in connection with employee evaluations.

Based on the foregoing, and the record in its entirety, I find that the lead drivers do not reward employees nor do they effectively recommend such action. Accordingly, I find that they are not statutory supervisors based on this criterion.

I turn now to a consideration of the Petitioner's argument that the lead drivers engage in assignment of work. The drivers have regular bid jobs and they perform those same jobs on a

daily basis. The lead drivers do not make daily job assignments based on driver competence or skills. Lead drivers are expected to move drivers around as needed to cover when a driver calls off work by taking the driver who is signed up for a particular overtime opportunity and placing that driver where needed to meet production requirements. On some occasions, such as in the case of an unexpected shortage in drivers, lead drivers may have to move drivers around to ensure adequate coverage for production purposes. With regard to such temporary assignments, the Petitioner's witnesses testified that in the case of the work performed by roller bed drivers, the drivers rotate continuously from servicing a particular grouping of lines to another grouping of lines. There was testimony that some lines are more difficult to work than other lines apparently because of the speed and the number of lines. However, there is no probative evidence that the lead drivers deviate from this practice of rotating drivers through these lines. Accordingly, there is no evidence that they exercise independent judgment in connection with such assignments. Additionally, there was no specific evidence that the lead drivers make any assignments with respect to the duties of drop lot drivers and, as noted previously, the assignments given to dispatch drivers come from Miller personnel, not from lead drivers or even from undisputed supervisors of the Employer.

Based on the foregoing, and the record in its entirety, I find that the lead drivers do not assign employees nor do they effectively recommend such action. Accordingly, I find that they are not statutory supervisors based on this criterion.

With regard to the lead drivers' putative authority to responsibly direct employees, I note that there is absolutely no evidence that the Employer has delegated to the lead drivers the authority to direct the work of the drivers or to take corrective action if necessary. In this regard, there is no evidence that a lead driver will or may suffer adverse consequences if he does not take steps to insure that any direction he may give is carried out. Without evidence that lead drivers are held accountable for the drivers' performance of discrete tasks, the type of direction given, if any, cannot be considered "responsible," and therefore does not constitute statutory authority under the Act.

Based on the foregoing, and the record in its entirety, I find that the lead drivers do not responsibly direct employees nor do they effectively recommend such action. Accordingly, I find they are not statutory supervisors based on this criterion.^{10/}

Oakwood Healthcare, supra, is the sole case cited by the Petitioner as supporting its position that the lead drivers possess at least one of the primary indicia set forth in Section 2(11) of the Act. I conclude, however, that it does not support the Petitioner's assertions. In *Oakwood*, the Board concluded that permanent charge nurses who assigned nurses to patients and to geographic areas within the emergency room were engaged in assigning employees to "significant overall tasks," and therefore engaged in assignment for purposes of Section 2(11) of the Act. However, the Board's analysis did not end there, but also considered whether the

^{10/} Although the Petitioner contends that the lead drivers possess secondary indicia of supervisory status, I note that secondary indicia is insufficient to confer supervisory status where the evidence fails to establish that the individual in dispute possesses one or more of the primary Section 2(11) indicia. *Crittendon Hospital*, 328 NLRB 879 (1999). As I have found that the lead drivers lack any primary indicia of Section 2(11) statutory authority, I find it unnecessary to address the Petitioner's contentions regarding secondary indicia.

charge nurses utilized independent judgment in making these assignments. *Id.*, slip op. at 13. The Board concluded, in part, that as the charge nurses were required to match patients with differing medical conditions with nurses of differing skills and abilities that the nurses necessarily utilized independent judgment in making these assignments. *Id.* Accordingly, the Board found these charge nurses to be statutory supervisors.

The facts in the instant case are markedly different from those in *Oakwood*. Here, drivers perform the same bid jobs on a daily basis with the exception of the roller bed drivers who, according to the testimony of the Petitioner's witnesses, rotate supplying empty receptacles from one set of production lines to another. This daily routine changes when a driver is being trained, when the Employer is short drivers, and when one or more of the production lines are down. When a driver is being trained, he or she may be moved from one area, such as dispatch, to another, such as the drop lots. There is no evidence, however, that the lead drivers determine the training regimen and it appears that the other drivers may have to skip a set of production lines in roller beds, but that the rotation otherwise continues unabated. When the Employer is short of drivers, the lead drivers merely pull a driver from the board who is slated to perform this overtime fill-in work and, it appears, assign that driver to the work of the missing driver. When Miller production is halted in an area for one reason or another, a lead driver may assign a driver to pull outbound trailers to the drop lots or to act as an additional trailer spotter in dispatch. The latter scenario is the usual practice as it limits the possibility of overtime hours being required. As none of the lead drivers testified, the record does not disclose whether lead drivers make these arguably "overall assignments" on their own. Additionally, there is no evidence as to how frequently they make such assignments or whether they can deviate from the usual practice of assigning the extra driver to dispatch – where he would presumably be under the direction of Miller personnel. In sum, there is simply no probative evidence that they exercise independent judgment in making these assignments or that these assignments are anything more than routine. The record simply does not support the Petitioner's contention that the lead drivers make assignments with independent judgment or that they possess any other Section 2(11) indicia.

Based on the foregoing, the record as a whole, and having carefully considered the arguments of the parties at the hearing and in their briefs, I conclude that the Petitioner has not met its burden establishing that the lead drivers are statutory supervisors. See, *Dean & Deluca New York, Inc.*, supra. Accordingly, I will include them in the unit.

IV. SUPERVISORY EXCLUSIONS FROM THE UNIT

The parties agree, the record shows, and I find that the following persons are supervisors within the meaning of Section 2(11) of the Act and I will exclude them from the unit: Dan Harmon, Director of the Central Region; Beverly Groene, General Manager; Brian Sullivan, Manager for Transportation Operations, Kevin Rhymur, Distribution Center Manager, Debra Turner, Administrative Supervisor; and Larry Homer, Garage Manager.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the above discussion, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers, including lead drivers, group lead drivers, dispatch drivers, drop lot drivers, roller bed drivers, and the drop lot clerk employed by the Employer at its Trenton, Ohio warehouse and transportation facility, excluding all material operators (warehouse employees), all office clerical employees, all plant clerical employees, the quality controller, the janitor/repack employee, all mechanics, all managerial employees, and all guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Warehouse, Production, Maintenance and Miscellaneous Employees, Furniture, Piano, Express Drivers and Helpers, Local Union No. 661, affiliated with the International Brotherhood of Teamsters. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their

replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **January 25, 2007**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001, or electronically pursuant to the guidance that can be found at the Agency's Website at www.nlrb.gov. Select the **E-Gov** tab and click on **E-Filing**, then select the type of document you wish to file electronically and you will navigate to detailed instructions on how to file the document. This request must be received by the Board in Washington by 5 p.m., EST on **February 1, 2007**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 18th day of January 2007.

/s/ Gary W. Muffley, Regional Director

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